

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 17, 2009 Session

KERRIE FROST v. JAMES SHEHANE, ET AL.

**Appeal from the Circuit Court for Maury County
No. 11041 Robert Jones, Judge**

No. M2008-01480-COA-R3-CV - Filed July 6, 2009

Tenant filed suit against former landlords, alleging violations of the Uniform Residential Landlord and Tenant Act (“URLTA”) and the Tennessee Consumer Protection Act (“TCPA”). Landlords filed a counter-claim, alleging that tenant breached the lease. The trial court awarded damages to landlords for breach of lease and awarded punitive damages under the URLTA to tenant. Finding that the trial court erred in the amount of damages awarded to landlords, the award is modified. Finding that tenant elected to pursue treble damages under the TCPA, the award of punitive damages under the URLTA is vacated and the matter remanded for the trial court’s consideration of whether an award of treble damages is warranted.

**Tenn. R. App. 3 Appeal as of Right; Judgment of the Circuit Court Modified and Reversed
in Part and Remanded**

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., and ANDY D. BENNETT, JJ. joined.

David Kozlowski, Columbia, Tennessee, for the appellant, Kerrie Frost.

Gary Howell, Mt. Pleasant, Tennessee, for the appellees, James Shehane and Alma Shehane.

OPINION

On November 7, 2003, Kerrie Frost and Eric Thurman (“Tenants”) entered into a Lease Agreement (“Lease”) with James and Alma Shehane to rent a home¹; the Lease required that the Tenants pay \$500.00 per month in rent by the 8th day of every month and that they pay a security deposit of \$400.00. The Tenants paid the security deposit and the rent for November, but failed to pay the December rent by the 8th day of the month. On December 12, 2003, Ms. Frost, who was pregnant, was admitted to Maury Regional Hospital due to problems related to the pregnancy; her child was born on December 18 and she was released from the hospital on December 20.

¹ Mr. Thurman was Ms. Frost’s fiancé at the time the Lease was signed; they are currently married.

On December 18, 2003, an agent of the Shehanes placed a note on the door of the leased premises notifying the Tenants that the Lease was terminated because they failed to pay December's rent. Ms. Frost's complaint alleged that, after discovering the note, Mr. Thurman informed the Shehanes that he and Ms. Frost were leaving on December 21 for South Carolina to be with his dying mother and that they would pay December's rent when they returned. Upon returning from South Carolina on December 28, 2003, the Tenants discovered that the home's locks had been changed and that their personal property was still inside. The Shehanes later sold some of the property to cover the unpaid rent.

On October 29, 2004, Ms. Frost filed suit,² alleging that the Shehanes violated the Tennessee Uniform Residential Landlord and Tenant Act ("URLTA")³ and the Tennessee Consumer Protection Act ("TCPA").⁴ Ms. Frost's complaint sought compensatory damages, treble damages under the TCPA, and punitive damages under the URLTA. On December 16, 2004, the Shehanes filed an answer and counterclaim, seeking unpaid rent and damages for breach of the Lease.

The trial court held a hearing on February 1, 2008, and entered an order on March 7, 2008, finding: (1) that Ms. Frost breached the Lease; (2) that Ms. Frost's breach entitled the Shehanes to the unpaid rent for December 2003 and to "two additional months [of rent], which would have been a reasonable time within which to re-rent the property"; (3) that the Shehanes violated the URLTA by failing to afford Ms. Frost adequate notice to allow the Shehanes to reclaim the premises; and (4) that the Shehanes did not have the authority to sell Ms. Frost's personal property. The court awarded the Shehanes a total of \$1500.00 for the unpaid December rent and for the two additional months of rent; the court awarded Ms. Frost a total of \$1700.00, which included \$1,050.00 for the value of her property, \$400.00 for the security deposit, and an award of \$250.00 in punitive damages. In all, Ms. Frost received a net judgment against the Shehanes in the amount of \$200.00.

On April 7, 2008, Ms. Frost filed a Rule 59.04 Motion to Alter or Amend, asking for an award of treble damages under the TCPA in lieu of the trial court's award of punitive damages and asserting that the award to the Shehanes of the two additional months of rent was error. The trial court denied the motion on May 28, 2008. Ms. Frost appeals.

II. Statement of the Issues

On appeal, Ms. Frost raises the following issues:

1. Whether the trial court erred by awarding the Shehanes rent after Ms. Frost had been locked out of the rented premises.

² Mr. Thurman did not join in filing the complaint.

³ Tenn. Code Ann. § 66-28-101, *et. seq.*

⁴ Tenn. Code Ann. § 47-18-101, *et. seq.*

2. Whether the trial court erred in failing to award Ms. Frost statutory treble damages as allowed by the TCPA.

III. Standard of Review

Because this case was tried without a jury, our review of the trial court's findings of fact is *de novo*, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d). Our review of the trial court's determinations regarding questions of law is *de novo* with no presumption of correctness. *See Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997).

IV. Analysis

A. Shehanes' Award of Damages

Ms. Frost concedes that her "failure to pay rent for December of 2003 admittedly was a breach of the rental contract"; however, she asserts that she was constructively evicted from the home when the Shehanes changed the locks and that "[t]he constructive eviction clearly terminated the lease and [she] had no legal obligation to pay rent after December 28, 2003." The Shehanes contend that Ms. Frost's breach of the lease entitled them to monthly rent until the premises could be re-rented and that their "[s]ubsequent violation of the Landlord Tenant Act [sic] did not relieve [Ms. Frost] of her liability." Both parties agree that the URLTA controls the landlord/tenant relationship between the parties.⁵

"If there is a material noncompliance by the tenant with the rental agreement..., the landlord may deliver a written notice to the tenant specifying the acts or omissions constituting the breach, and that the rental agreement will terminate upon a date not less than thirty days (30) after receipt of the notice." Tenn. Code Ann. § 66-28-505(a). Specifically, "[i]f rent is unpaid when due and the tenant fails to pay, *written notice by the landlord of nonpayment is required* unless otherwise specifically waived in a written rental agreement." Tenn. Code Ann. § 66-28-505(b) (emphasis added). In order for a landlord to retake possession of leased premises or to seek damages from the tenant, Tenn. Code Ann. § 66-28-512 provides that:

If the tenant remains in possession without the landlord's consent after expiration of the term of the rental agreement or its termination, the landlord *may bring an action for possession* and if the tenant's holdover is willful and not in good faith, the landlord, in addition, may recover actual damages sustained by the landlord, plus reasonable attorney's fees.

⁵ At trial, the Shehanes' attorney made the following statement during closing arguments: "But I'll concede, and Your Honor can check volume 13 in the code, that under the 2000 census figures for Maury County, Maury County was 1,400 people over the limit that made [the URLTA] applicable here."

Tenn. Code Ann. § 66-28-512(c) (emphasis added).

In its March 7, 2008, order, the trial court found that Ms. Frost “breached the lease agreement...by failing to pay rent in the month of December, 2003.” As stated earlier, a landlord (1) must deliver to a tenant notice of the nonpayment of rent, Tenn. Code Ann. § 66-28-505(b); (2) can terminate the lease for the nonpayment of rent - i.e., a material noncompliance with the lease - no earlier than 30 days after the date notice is given, Tenn. Code Ann. § 66-28-505(a); and (3) can seek damages for the breach of the lease “after expiration of the term of the rental agreement or its termination.” Tenn. Code Ann. § 66-28-512(c). Therefore, once Ms. Frost failed to pay rent for December 2003, the Shehanes were required to deliver written notification to her of that noncompliance with the Lease in order to start the 30 day time period, after which they could terminate the Lease and seek damages. The trial court found, however, that the Shehanes “failed to give [Ms. Frost] and her co-tenant adequate notice to allow them to reclaim possession of the residence under the [URLTA].” Consequently, the Shehanes failed to terminate the Lease or institute an action to recover damages for breach of the Lease in accordance with the URLTA. Tenn. Code Ann. § 66-28-505(b); Tenn. Code Ann. § 66-28-512(c). Accordingly, we modify the trial court’s award of damages to the Shehanes by eliminating the award of two months rent for January and February 2004.⁶

B. Award of Punitive Damages to Ms. Frost

In her complaint, Ms. Frost sought punitive damages under the URLTA and treble damages under the TCPA. She acknowledged at trial and on appeal that she was required to elect one remedy to pursue. Ms. Frost chose to pursue treble damages under the TCPA⁷; however, the trial court ultimately awarded her punitive damages under the URLTA. On appeal, Ms. Frost asserts that the trial court erred in awarding her punitive damages under the URLTA when she elected to pursue treble damages under the TCPA.

⁶ Ms. Frost asserts that she should not be responsible for paying the last three days of December, during which she was constructively evicted from the home; however, she provides no authority to support that assertion. Tenn. R. App. P. 27 states that “[t]he brief of the appellant shall contain...(6) An argument...setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor...with citations to the authorities and appropriate references to the record...relied on.” Tenn. R. App. P. 27(a)(6) (emphasis added). Thus, without citations to authority, the issue is waived.

⁷ At the hearing, the trial court held the following colloquy with Ms. Frost’s attorney:

THE COURT: So you’re asking for punitive damages under the [URLTA] and treble damages under the [TCPA].

[Ms. Frost’s Attorney]: Yes, Your Honor.

THE COURT: You have to elect at some point in time which you’re going to get.

[Ms. Frost’s Attorney]: Okay.

THE COURT: You can’t get both.

[Ms. Frost’s Attorney]: I understand, Your Honor. At this time, we’re seeking actual damages along with the treble damages, Your Honor.

The TCPA provides, in part pertinent, that:

(a)(1) Any person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by [the TCPA], may bring an action individually to recover actual damages.

(3) If the court finds that the use or employment of the unfair or deceptive act or practice was a willful or knowing violation of [the TCPA], *the court may award three (3) times the actual damages sustained* and may provide such other relief as it considers necessary and proper.

Tenn. Code Ann. § 47-18-109 (emphasis added). The URLTA provides that “[i]f the landlord unlawfully removes or excludes the tenant from the premises..., the tenant may recover possession or terminate the rental agreement and, in either case, recover actual damages sustained by the tenant, and *punitive damages when appropriate*, plus a reasonable attorney’s fee.” Tenn. Code Ann. § 66-28-504 (emphasis added).

The Tennessee Supreme Court in *Concrete Spaces, Inc. v. Sender*, 2 S.W.3d 901 (Tenn. 1999) addressed the situation in which a plaintiff was eligible to recover damages under two separate remedies:

The doctrine of election of remedies is implicated when two inconsistent and irreconcilable remedies are available to the plaintiff to redress a single wrongful act. The purpose of the doctrine is to prevent double redress for a single wrong and it requires the plaintiff in such a scenario to choose one theory of recovery under which to proceed.

Because multiple damages are punitive in nature and not intended to compensate for the plaintiff’s injury, a plaintiff cannot recover both punitive damages and multiple damages in the same cause of action, even if they are each available, because receipt of both forms of enhanced damages violates the principle against double recovery.

Id. at 906-07 (citations omitted). Specifically, the TCPA’s “allowance for treble damages is intended to be punitive rather than compensatory. . . [a]ccordingly, a plaintiff is precluded from recovering both types of enhanced damages under the Act.” *Id.* at 907. In applying the doctrine of election of remedies, this Court has adopted “[t]he most prevalent approach [which] allows the plaintiff to submit to the fact finder all theories of recovery” and “[i]f the jury (and judge, in some instances) determines that the plaintiff is entitled to both forms of enhanced damages, the plaintiff may request that the amount of damages under each remedy be determined before making an election of which remedy he or she would like the judgment to reflect.” *Id.* at 908.

In the present matter, Ms. Frost chose to pursue treble damages under the TCPA prior to the start of the hearing but, on appeal, acknowledges that “neither party has raised that procedural matter as error.” Rather, Ms. Frost contends that the trial court’s entry of a judgment which awarded damages under a theory of recovery she chose not to pursue was error. We agree. As stated earlier, when two remedies are available, a plaintiff is required to choose one of those theories of recovery to pursue over the other. *Concrete Spaces, Inc.*, 2 S.W.3d at 906. In the present matter, Ms. Frost’s election to pursue treble damages under the TCPA entitled her to have the trial court consider, and, if warranted, award, damages under that theory of recovery. The trial court erred in making the punitive damage award since it ignored Ms. Frost’s election and instead awarded damages under the theory of recovery she chose not to pursue. By this ruling, we are not suggesting that Ms. Frost is necessarily entitled to an award of treble damages, but rather that she is merely entitled to a consideration of an award of damages under her chosen theory of recovery. The award of punitive damages under the URLTA is reversed and the case remanded to the trial court for consideration of whether an award of treble damages under the TCPA is warranted.

V. Conclusion

For the reasons set forth above, the decision of the Circuit Court is MODIFIED IN PART, REVERSED IN PART and REMANDED for proceedings consistent with this opinion. Costs are assessed against the Shehanes, for which execution may issue if necessary.

RICHARD H. DINKINS, JUDGE